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No. 87-893

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALSTON A. EMANUEL, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a promotion decision resulting from a subjective decisionmaking process is subject to challenge under the disparate impact analysis approved by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 828 F.2d 438. The opinion of the district court (Supp. App. A37-A64) is reported at 628 F. Supp. 564.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1987. The petition for a writ of certiorari was filed on November 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Beginning in 1963, petitioner, a black male, was employed by the United States Army, first as a warehouse supervisor and subsequently, from 1967 to 1975, as a packaging specialist at the Troop Support and Aviation Material Readiness Command (TSARCOM) in St. Louis,

Missouri (Supp. App. A40). In 1975, petitioner sought a promotion to the position of a GS-12 Senior Staff Packaging Specialist (Pet. App. A3). After the position was awarded to John Snyder, a white male who also was employed as a packaging specialist, petitioner filed a complaint of race discrimination with the United States Army Civilian Appellate Review Agency (USACARA), an independent agency with the responsibility for investigating civilian Army employee discrimination complaints (*id.* at A4). USACARA investigated the matter and concluded that Mervin Edwards, petitioner's supervisor, and John Greenwell, Edwards' supervisor, had discriminated against petitioner because of his race in denying him the promotion (*ibid.*). The Army accepted USACARA's recommendation and awarded petitioner a retroactive promotion with backpay (*ibid.*). Snyder retained his promotion and was transferred to another Army command center in the St. Louis area (*ibid.*).

From 1975 to 1980, Snyder and petitioner did well in their careers with the Army (Pet. App. A5). Snyder received a Sustained Superior Performance award, which is considered a significant and prestigious award (*ibid.*). Petitioner completed some additional training courses and received two achievement awards, albeit relatively minor ones (*ibid.*).

In April 1980, Mervin Edwards, then Chief of the Packaging Branch, retired (Pet. App. A5). Petitioner was temporarily assigned to this GS-13 position (*id.* at A5-A6). Under Army civilian personnel regulations, however, the permanent replacement in this GS-13 position had to be selected from a list of qualified applicants compiled and supplied by the Army Civilian Personnel Center (CIVPERCEN) in Alexandria, Virginia, pursuant to a career program system in which applicants annually submit statements of their qualifications and interests, together with ratings of their skills, knowledge, abilities,

and personal (SKAP) characteristics, and in which a panel convened by CIVPERCEN reviews the statements and SKAP ratings and refers to selection officers the applicants found "best qualified" (*id.* at A6-A7). While petitioner's name was on this list, the selecting officer, Lt. Col. Robert Straeb, ultimately selected John Snyder, on the basis of SKAP ratings, education, awards, training, and experience, to fill the position permanently (*id.* at A8-A10). Thereafter, Gen. Leo Pigaty, Straeb's supervisor, conducted an independent review of Straeb's decision, agreed that Snyder was superior to petitioner in terms of experience, awards, and training, and thus found his promotion to be appropriate (Supp. App. A48-A49).

Petitioner responded by filing another complaint of race discrimination with USACARA (Supp. App. A49-A50). After an investigation, USACARA concluded that petitioner had again been discriminated against, but this time the Army rejected USACARA's conclusion (*id.* at A50-A51). Accordingly, petitioner filed this action in the district court, seeking promotion to the supervisory position and an award of back pay (Pet. App. A10).[1]

2. The district court entered judgment for the Army (Supp. App. A37-A64). It initially held that petitioner had failed to exhaust administrative remedies with respect to his claim of retaliation and, accordingly, that any such claim was jurisdictionally barred (*id.* at A53-A54). It next held that disparate impact analysis could not be applied to petitioner's discrimination claim because petitioner was

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[1] Plaintiff originally brought this case as a class action (Pet. App. A10). Following his retirement, he withdrew as class representative and another individual was substituted in his place (*id.* at A10-A11). The district court, however, determined that the putative class lacked numerosity and refused to certify it (*id.* at A11-A12). This determination was later affirmed by the court of appeals, and petitioner did not seek certiorari review of this aspect of the court of appeals' judgment.

not challenging a facially neutral selection device (*id.* at A56-A57). Finally, it held that, while petitioner had established a prima facie case of intentional discrimination, the Army had articulated legitimate nondiscriminatory reasons for its decision to promote Snyder (and not petitioner) and that these reasons were not pretexts for discrimination (*id.* at A60-A63).

3. The court of appeals affirmed (Pet. App. A1-A36). It first rejected petitioner's argument that the Army was estopped from claiming that Snyder was better qualified for the GS-13 position (*id.* at A13-A15). It then held that the district court had properly applied only a disparate treatment analysis to petitioner's claim that the Army's subjective evaluation and promotion procedures had discriminated against him (*id.* at A15-A19). Finally, it held that the district court's nondiscrimination finding under the disparate treatment analysis was not clearly erroneous (*id.* at A20-A25). Circuit Judge Heaney dissented on this last point (*id.* at A29-A36).

ARGUMENT

Petitioner contends that the courts below erred in refusing to apply the disparate impact analysis approved by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), to his challenge to the Army's subjective evaluation and promotion procedures. This contention raises the precise question presented to the Court in *Watson* v. *Fort Worth Bank & Trust Co.*, No. 86-6139 (argued Jan. 20, 1988), where we have argued as amicus curiae that only disparate treatment theory should apply in challenges to subjective decisionmaking processes.[2] The Court should therefore hold the petition pending its decision in *Watson* and dispose of it as is appropriate in light thereof.

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[2] We are furnishing counsel for petitioner with a copy of our brief in *Watson*.

CONCLUSION

The Court should hold the petition for a writ of certiorari and dispose of it in light of its decision in *Watson* v. *Fort Worth Bank & Trust Co.*, No. 86-6139.

Respectfully submitted.

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